United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7073/74

United States Court of Appeals

FOR THE SECOND CIRCUIT

MMI LTD. and INTERCAMBIO COMERCIAL KATZ & ARSARAZ, S.A.,

Plaintiffs-Appellants,

v.

PERACO CHARTERING CORPORATION,

Defendant-Appellee.

STALCO INTERNATIONAL CORPORATION,

Plaintiff-Appellant,

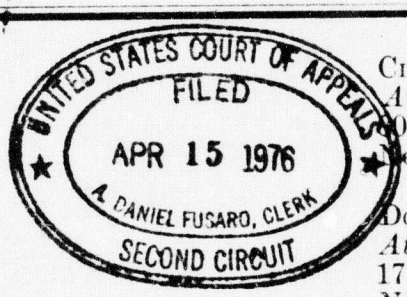
v.

FINANCIAL ENTERPRISES OF THE BAHAMAS, LTD., HESNES SHIPPING, S.A. AND, PER ARNSTEIN ARNEBERG,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF



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United States Court of Appeals
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Docket No. 76-7074

MMI LTD., and INTERCAMBIO COMERCIAL KATZ & ARSARAZ, S. A.,

Plaintiff-Appellant,

against

PERACO CHARTERING CORPORATION,

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Docket No. 76-7073

STALCO INTERNATIONAL CORPORATION,

Plaintiff-Appellant,

against

FINANCIAL ENTERPRISES OF THE BAHAMAS LTD., HESNES SHIPPING, S.A. and PER ARNSTEIN ARNEBERG,

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APPELLANTS' BRIEF

Statement

This is an appeal from the District Court's dismissal of both of the above captioned cases for lack of essential jurisdiction, and the denial of plaintiff's related motion to correctly allege the jurisdictional facts. The two actions

concern the same events, but a proposed consolidation order was never acted upon. This court consolidated the appeal.

The Factual Background

Each plaintiff had business connections in Israel and together, they were told of the opportunity to supply a tanker needed by Israeli interests on a long term time charter. They lacked expertise in shipping and entered into a joint adventure with defendants—knowledgeable in that field—whereby defendants agreed to supply the ship, and plaintiff the charter. After protracted negotiation, plaintiffs produced a signed charter, but defendants failed to supply the ship they had promised and the opportunity was lost. Plaintiffs filed these suits to recover lost commissions in excess of $580,000 and expenses of approximately $86,000.

The jurisdictional problem concerns only one plaintiff, Stalco International Corp. (hereafter Stalco), a California corporation which at one time did business in New York. Defendant Peraco is a New York corporation, and the issue arises if Stalco had its principal place of business in New York at any relevant time. To demonstrate most easily how and why the trial court erred, it seems best to put the proceedings in chronological order.

In July, 1971, the first action (71 Civ. 3118) was filed naming all parties now in both suits, and alleging that Stalco was a California corporation with a place of business in New York. (A4) The jurisdiction was challenged and an avoiding tactic was employed. Plaintiff's counsel moved to amend the complaint by dropping Stalco as a party, and commencing a new action against some of the defendants, *Stalco* v. *Financial, Hesnes and Arneberg,* 72 Civ. 4926. (A38) Consolidation of these two suits would have then resulted in the same adversaries, but with a technical change to insure jurisdiction.

Defendants opposed the motion and it was referred to Magistrate Raby who clearly stated its frank purpose and recommended approval, noting that defendants did not oppose consolidation and had only objected on the grounds that two suits would be more costly to defend. (A26) Judge Lasker approved the recommendation and granted the motion in an opinion dated April 6, 1973. (A31) An amended complaint in the first action had been filed in December, 1972 (A32), along with the motion to do so; the complaint in the new second action had been filed the month before. (A38)

Pre-trial preparations were then conducted and concluded in each case. Nothing with respect to the jurisdictional question occurred until January, 1975, when Magistrate Schreiber directed the parties to prepare a pre-trial order since all discovery had then been completed. At that pre-trial conference, defense counsel for the first time raised a jurisdictional defense by claiming that Stalco was an indispensable party to the first action, but could not be joined because joinder would destroy diversity jurisdiction.

The Magistrate directed that an appropriate motion be made and after review, recommended a finding that Stalco was indispensable, that it could not be joined because of the diversity problem, and that both complaints should therefore be dismissed. (A137) He also recommended denial of Stalco's motion to amend its allegation of citizenship. Plaintiffs filed an affidavit in opposition to the Magistrate's report and recommendation. (A150) It incorporated a definitive affidavit by Alan D. Jacobson, Vice President of Whittaker Corporation and of its wholly owned subsidiary, Stalco which shows that Stalco was not a New York resident for jurisdictional purposes at any relevant time. (A157) Although Judge Lasker considered the Jacobson affidavit (the Magistrate had not seen it), he followed the Magistrate's recommendations and ordered the dismissal now appealed from. (A168)

I

The facts concerning Stalco's citizenship are not disputed and there has always been diversity jurisdiction.

Absent the mistaken belief concerning Stalco's citizenship, the cases would not have been dismissed, and a routine joinder order entered pursuant to F.R.C.P. 19(a) which provides:

> "If he has not been so joined, the Court shall order that he be made a party."

We agree that jurisdiction requires compliance with the statute, and that it cannot otherwise be conferred. It is a fact to be pleaded and proved at the trial and it can be contested there, just as with any other issue. But the test comes then—not before. As stated by the Supreme Court in *Scheuer* v. *Rhodes* (1974), 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

> prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 US 41, 45-46, 2 L.Ed. 2d 80, 78 S.Ct. 99 (1957) (footnote omitted.)" (p. 236)

A pre-trial motion to dismiss for lack of jurisdiction is equivalent to a motion for summary judgment, requiring only proof of substantial supportive evidence to defeat it. 2A *Moore's Federal Practice*, Sec. 12.09(3) pp. 2297-2313. There is only one statement on jurisdiction in this record by a person with actual knowledge, namely, the affidavit of Jacobson, the Vice President of the corporation. (A157) His affidavit states that when the original suit was filed in July 1971, Stalco International was a division of a California corporation with its principal place of business in Los Angeles. The affidavit also explains how an observer could have been misled because the corporation had been doing business in New York until a year before, when it was merged into Whittaker, a California corporation. Thereafter, Whittaker conducted its New York business through a division called Stalco International *Company*. Thus, a precise identification of plaintiff Stalco in the complaint would be, "Stalco International Company, a division of Whittaker Corporation."

It is easy to see how an employee based in New York could have little interest in, and might fail to understand technical changes of this nature, especially when his checks and correspondence continued to show the key word, "Stalco". And that is how the confusion arose. Goldberg was the Stalco employee* who participated in the events which form the basis of this litigation. Plaintiffs' attorneys went to Goldberg for details of the transactions since MMI is in Israel and Katz is in Mexico. Regrettably, we assumed that his knowledge of the dispute made him equally knowledgeable concerning the corporate structure.

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* He was neither an officer nor a director.

Thus, the original complaint alleged "upon information and belief" that Stalco was a California corporation with a place of business in New York. (A4)

Defense counsel has assembled the opposing evidence in an affidavit dated May, 1975. (A130) He relies only upon the following:

1. An affidavit by Goldberg that at all relevant times he was an "employee and special representative" of Stalco, which he then identified as a "trading company located in New York."

2. An affidavit by plaintiffs' attorneys that in July 1971, "Stalco" was doing business in New York City. (This information came from Goldberg and, as the defense properly points out, is not confirmed or corroborated by an officer of Stalco.)

3. Another affidavit by plaintiffs' attorneys that Stalco had its principal place of business in New York City. (Such information also came from Goldberg.)

4. Similar allegations of residence in a state court action. (Obviously, the allegations would be the same, and for the same reasons.)

5. Goldberg's deposition taken in 1971, wherein he testified that he was an employee and special representative of Stalco and that his office was in New York City. (He also testified in that same deposition that "Whittaker has an office in California.")

From the foregoing it can be seen that the only contradiction to the Jacobson affidavit is the misconception of an employee 3,000 miles from the home office, plus counsel's misplaced reliance on his statement. The Court below found that Stalco was bound by these prior inaccurate statements and denied a request to amend its allegation

of citizenship to conform to the facts shown in the Jacobsen affidavit. This, despite the provisions of 28 U.S.C.A. 1653 which state:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

In *Howard* v. *De Cordova* (1900), 177 U.S. 609, 614, 44 L.Ed. 908, 911, the Supreme Court stated that where jurisdictional allegations in the complaint are defective,

> ". . . it was not only within the power, but the duty of the court, on its attention being called to the fact, to have allowed such an amendment to be made."

This mandate has been carefully observed by other courts. In ***Shahmoon Industries, Inc.*** v. *Imperato* (3rd Cir., 1964), 338 F. 2d 449, there was a similar jurisdictional problem. The Court of Appeals remanded twice so that precise factual findings could be made before ruling on diversity jurisdiction.

Magistrate Schreiber recognized this principle when he stated in his report that:

> ". . . It is generally true that a complaint which fails to allege the citizenship of a party may be cured by amendment. *Howard* v. *DeCordova*, 177 U.S. 609 (1900). Also, where a complaint does not state that jurisdiction is founded on diversity but the alleged facts indicate that diversity of citizenship exists, the amendment is allowed. *Decorative Cabinet Corporation* v. *Stor-Aid of Ohio, Inc.*, 10 F.R.D. 266 (S.D.N.Y. 1950). One court has stated that an application for an amendment to a statement of citizenship is usually construed liberally, 'if it is possible to determine from the record that jurisdiction does in fact exist.' *John Birch Society* v. *Nat'l Broadcasting Co.*, 377 F. 2d 194, 199 (2d Cir. 1967). The intent of section 1653 is obviously to allow amendment where the record discloses that jurisdiction exists but the allegations have

not been pleaded correctly. The entire record may be searched to discover facts necessary to cure the defect. *Troupe* v. *Chicago, Duluth and Georgian Bay Transit Co.*, 234 F. 2d 253, 258 n. 6 (2d Cir. 1956). Had plaintiff Stalco sought to amend its complaint to allege citizenship in conformity with the facts in the pleadings, *that amendment would certainly have been granted.*" (emphasis added) (A145-6)

Unfortunately, at the time the Magistrate wrote his report the record did not contain the Jacobson affidavit. It was being secured from California and had it been available, we believe from the Magistrate's above quoted review of the law, it would have resulted in a different recommendation by him. The Jacobson affidavit was presented to Judge Lasker, but he decided to follow the Magistrate's prior recommendation.

II

The delay in correcting the pleadings was excusable and caused no detriment to the defense.

The Magistrate's report points to an apparent four-year delay in ascertaining the correct jurisdictional facts, as one reason for denying leave to amend. But the record clearly shows that the delay was occasioned by the actions of defense counsel.

When the jurisdictional issue was first raised and then avoided by splitting the action into two suits, defendants' counsel only objected to the cost and we assumed the problem had been satisfactorily resolved, especially since Judge Lasker had endorsed the idea (A31). The issue was not raised again until the pre-trial conference before Magistrate Schreiber in January, 1975,* at which time the

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* No answer to the amended complaint in 71 Civ. 3118 or to the complaint in 72 Civ. 4926 was served until April, 1975.

cases were to be marked ready for trial and a pre-trial order signed. Once the point was raised, plaintiffs acted with dispatch and produced the definitive affidavit of the Vice President of Whittaker and Stalco. Any delay, therefore, was not the fault of the plaintiffs who for nearly three years had been preparing these cases in good faith and had assumed that defendants were doing likewise. Only when faced with an imminent trial did defendants reveal the lurking jurisdictional defense.

Nor can the defense claim prejudice. Plaintiffs' allegations remain unchanged, i.e., that there is and always has been diversity jurisdiction. The delay was occasioned by defendants' apparent acceptance of the split actions in 1973 and its failure to plead the new jurisdictional defense until two years later, on the eve of trial (A92). Under established equitable procedure this unexcusable delay should constitute a waiver, especially since dismissal could now be fatal. *Parker Rust-Proof Co.* v. *Western Union* (2d Cir. 1939), 105 F. 2d 976.

III

The state court as an alternative forum is more illusory than real.

We submit that the availability of another forum should have no bearing on whether or not there is proper jurisdiction in this Court. Yet, it is an argument which we cannot ignore since both the Magistrate and Judge Lasker specifically noted that a dismissal here would result in no prejudice because of a similar suit filed in New York Supreme Court. (A144, A169)

That action does exist. It was filed in 1972 for insurance purposes, in the event the motion to split the action, made at that time, was denied (A74). But no discovery or depositions have been conducted in that court. All of the

extensive pre-trial work was conducted under the sole supervision of this Federal Court. Furthermore, we have Federal court depositions of essential witnesses who are now either dead, or beyond the subpoena power of the state court. The Federal action was on the verge of a pre-trial order, i.e., a certification by both sides that the case was in all respects ready for trial. It would be cruel to equate that position with a newly joined issue in Supreme Court, and it is clear that dismissal here would be fatally prejudicial. In view of the foregoing, it seems fair to ask what was defendants' objective in waiting until the eleventh hour to raise the jurisdictional defense. *Parker Rust-Proof Co.* v. *Western Union, supra.*

IV

The motion to amend so as to allege a joint venture should be granted.

In dismissing the complaints for lack of jurisdiction, Judge Lasker held that it mooted a second motion by plaintiffs to allege a joint venture in more specific language. (A168) The motion may have been unnecessary under the modern rules of pleading in this court. However, defense counsel continued to insist that even after years of pre-trial deposition and discovery, he was still unaware of the basic theory of plaintiffs' action. To avoid any last-minute claim of surprise at trial, we moved to make a simple amendment in each complaint, as set forth in the Appendix at pages 63 and 64.

If Judge Lasker's decision on this motion is considered to be a failure or refusal to grant it, we submit that it was error, since pre-trial amendments are freely permitted. This is especially true when the amendment aids the opposing party by narrowing, instead of enlarging the claim against it.

Conclusion

Plaintiffs seek no special treatment. They ask only the opportunity to plead and prove to the satisfaction of the trial court that the essential facts of jurisdiction are present, and to have their day in court. The order of dismissal would reward defense counsel for lulling plaintiffs into a belief that this was the acceptable forum, for participating in pre-trial preparations which it secretly intended to avoid, and for waiting until the eleventh hour to act. The denial of plaintiffs' motions to amend the complaint would punish an action designed to fairly apprise opposing counsel of the proof to be presented at the trial. The order of the court below should be reversed as a matter of right, of justice, and of equity.

Respectfully submitted,

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Of Counsel

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 14TH day of APRIL 1976

Skip Hunt for Daniel Nooney
.....
Attorney for APPELLEES